INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. —

JOHN M. LEHMANN, OFFICER IN CHARGE,
PETITIONER [1]

v.

UNITED STATES OF AMERICA EX REL. BRUNO CARSON
OR BRUNO CARASANITI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

The Solicitor General, on behalf of petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit reversing the order of the United States District Court for the Northern District of Ohio, which had denied respondent's petition for a writ of habeas corpus, and remanding the case for further proceedings.

OPINIONS BELOW

The opinion of the Court of Appeals, set forth in the Appendix, *infra*, pp. 21–32, is reported at

[1] John M. Lehmann was substituted for J. S. Kershner on February 16, 1956 (see App. *infra*, p. 33).

228 F. 2d 142. The memorandum opinion of the District Court appears in the record (R. 49–50).[2]

JURISDICTION

The judgment of the Court of Appeals was entered on December 17, 1955 (App., *infra*, p. 32). A timely petition for rehearing was denied on January 30, 1956 (App., *infra*, p. 33). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether respondent, who is otherwise deportable under Sections 241 (a) (1) and (4) of the Immigration and Nationality Act of 1952 as an alien who entered this country as a stowaway in 1919 and committed two crimes in 1935, but who was not deportable at the time the 1952 Act went into effect, had a "status" of non-deportability which was preserved to him by the savings clause of the 1952 Act despite the fact that Section 241 (d) of that Act expressly makes retroactive the grounds for deportation specified in the Act.

STATUTES INVOLVED

The Immigration and Nationality Act of June 27, 1952, 66 Stat. 163, provides in pertinent part:

Section 241 (a) (1), 66 Stat. 204, 8 U. S. C. (1952 ed.) 1251 (a) (1):

[2] The original record in the Court of Appeals and respondent's exhibit A, consisting of his immigration file, have been paginated consecutively, the numbers appearing in the lower right hand corner.

Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

Section 241 (a) (4), 66 Stat. 204, 8 U. S. C. (1952 ed.) 1251 (a) (4):

Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

* * * * * *

(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;

Section 241 (b), 66 Stat. 208, 8 U. S. C. (1952 ed.) 1251 (b):

(b) The provisions of subsection (a) (4) respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and unconditional pardon by the President of the United States or by the

Governor of any of the several States, or (2) if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter; a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter.

Section 241 (d), 66 Stat. 208, 8 U. S. C. (1952 ed.) 1251 (d):

(d) Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act.

Section 405 (*a*), 66 Stat. 280, 8 U. S. C. (1952 ed.) 1101 note:

(a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of

exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. * * *

The Immigration Act of February 5, 1917, 39 Stat. 874, provided in pertinent part:

SEC. 19. That at any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law; any alien who shall have entered or who shall be found in the United States in violation of this Act, or in violation of any other law of the United States; * * * shall, upon the warrant of the Secretary of Labor, be taken into custody and deported: * * * *Provided further,* That the provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, * * *.

STATEMENT.

This is a habeas corpus proceeding instituted by respondent in the United States District Court for the Northern District of Ohio to challenge the legality of his detention under a warrant of deportation dated January 19, 1954 (R. 67). Respondent was found deportable under Section 241 (a) (1) of the Immigration and Nationality Act of 1952 (*supra*, pp. 2–3), as an alien who, at the time of entry, was excludable by the law existing at the time of entry, *i. e.*, a stowaway under section 3 of the Immigration Act of February 5, 1917 (R. 67); and also under Section 241 (a) (4) of the 1952 Act (*supra*, p. 3) as an alien who has been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct (R. 67).

The relevant facts may be summarized as follows:

Respondent, a native and citizen of Italy, entered this country in 1919 as a stowaway (R. 103). The pertinent law then in effect was Section 19 of the Immigration Act of February 5, 1917, 39 Stat. 889, which provided (*supra*, p. 5):

> That at any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law; any alien who shall have entered or who shall be found in the United States in violation of this Act, or in violation of any other law of the United States;

> * * * shall, upon the warrant of the Secretary of Labor, be taken into custody and deported. * * *.

Stowaways were among the classes excluded at the time of respondent's entry under the provisions of section 3 (a) of the 1917 Act, 39 Stat. 876. He was not, however, deported within the five year period of limitations contained in the 1917 Act.[3]

On January 15, 1936, respondent was convicted in the Common Pleas Court, Cuyahoga County, Ohio, of the crime of blackmail committed on or about December 11, 1935 (R. 118). He was also convicted on April 25, 1936, in the Common Pleas Court, Lorain County, Ohio, of the crime of blackmail committed on or about October 15, 1935 (R. 119). A warrant of arrest for deportation was issued in 1937 against respondent based upon these two convictions (R. 96). In 1945, the outstanding order of deportation against respondent was withdrawn when the Governor of Ohio granted respondent a conditional pardon for the second of his two convictions (R. 96–97). The pardon was granted to respondent "From this time forward, conditioned upon good behavior and conduct and provided that he demeans him-

[3] Section 14 of the Immigration Act of May 26, 1924, 43 Stat. 162, made an alien entering illegally deportable at any time, but was not retroactive. It therefore did not affect the limitation against respondent's deportability which occurred upon the passage of the five year statutory period of limitations under the 1917 Act.

self as a law abiding person and is not convicted of any other crime, otherwise this pardon to become null and void" (R. 123). This pardon was considered sufficient by immigration officials to confer immunity to deportation under the law then in effect, Section 19 of the Immigration Act of 1917 (R. 97), which provided (*supra*, p. 5):

> * * * *Provided further,* That the provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned * * *.

The present warrant of arrest was issued against respondent on June 23, 1953 (R. 115). After a hearing (R. 100–114), he was ordered deported by a Special Inquiry Officer (R. 99). The order of deportation was affirmed in a memorandum opinion of the Board of Immigration Appeals on January 19, 1954 (R. 71–77), which discussed the question of whether respondent had acquired a non-deportable status protected by the savings clause of the 1952 Act, Section 405 (a), *supra*, pp. 4–5 (R. 75–76).

Respondent then filed this petition for a writ of habeas corpus, alleging that the charges against him as a stowaway were based on the Immigration Act of 1917 which carried a statute of limitation of five years, and that he had been granted a pardon as to one of the crimes alleged in the charge of conviction for two crimes (R. 3–5). Relying upon the reasons stated and authorities cited in the memorandum opinion of the

Board of Immigration Appeals, the District Court denied the petition (R. 50).[4]

The Court of Appeals reversed, holding that as to both charges respondent had a status of non-deportability within the scope of the savings clause of the 1952 Act, and that the retroactive language of Section 241 (d) (*supra*, p. 4) was not a clear manifestation of intent to withdraw the protection of the savings clause (App., *infra*, pp. 21–32). In reversing the lower court, however, the Court of Appeals indicated that the interplay between the relevant sections was not entirely free from doubt (App., *infra*, p. 32).

REASONS FOR GRANTING THE WRIT

The Court of Appeals, although noting that the issue is not free from doubt, has held that before 1952 respondent acquired a status of non-deportability which was preserved to him under the savings clause of the 1952 Act, even though he is a member of two of the classes of excludable aliens described in Section 241 (a) of that Act, and even though Section 241 (d) expressly provides:

> *Except as otherwise specifically provided in this section,* the provisions of this section shall be applicable to all aliens belong-

[4] Contrary to his decision in this case, the same district judge subsequently held in *United States ex rel. Sciria* v. *Lehmann*, 136 F. Supp. 458 (N. D. Ohio), that an alien entering as a stowaway before 1924 acquired a status of non-deportability when the statute of limitations had run, and that the status was preserved by the savings clause of the 1952 Act. This case is on appeal in the Sixth Circuit.

> ing to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act. [Emphasis added.]

As we develop below, the decision of the Sixth Circuit conflicts with that of the Court of Appeals for the Fifth Circuit in *Gagliano* v. *Bonds,* 222 F. 2d 958, 959 (C. A. 5), certiorari denied, 350 U. S. 902, holding that the savings clause is inapplicable to the conditions of deportability spelled out in Section 241 which are not expressly made prospective. It is also contrary to the implications of the ruling of this Court in *Marcello* v. *Bonds,* 349 U. S. 302, and that of the First Circuit in *Pino* v. *Nicolls,* 215 F. 2d 237, 246 (C. A. 1) (reversed on other grounds in *Pino* v. *Landon,* 349 U. S. 901), that conditions of deportability specified in Section 241 apply to aliens who were not, before the 1952 Act, deportable on such grounds. In addition, the decision below misapplies the holdings of this Court in *United States* v. *Menasche,* 348 U. S. 528 and *Shomberg* v. *United States,* 348 U. S. 540, when it declares that Section 241 (d) is not a clause making specific provision for the retroactive application of the conditions of deportability spelled out in Section 241, so as to render the savings clause of Section 405 inapplicable by its own terms.

The issue is one of continuing importance since the relation of the savings clause to the grounds of deportability spelled out in Section 241 of the 1952 Act will affect the standing of a large number of aliens for years to come. Not only the court below in this case, but the Court of Appeals for the Eighth Circuit in *United States ex rel. De Luca* v. *O'Rourke*, 213 F. 2d 758, 764 (C. A. 8), expressed doubts as to the interplay between the two sections. This interplay has also been a source of confusion in the district courts. The issue is, therefore, one which should be resolved by this Court.

1. *Marcello* v. *Bonds*, 349 U. S. 302, and *Gagliano* v. *Bonds*, 222 F. 2d 958 (C. A. 5), certiorari denied, 350 U. S. 902, both involved aliens who had been convicted before 1952 of narcotic violations which were not at the time grounds for deportation. Section 241 (a) (11) of the 1952 Act (8 U. S. C. 1251 (a) (11)) made a conviction at any time of a crime relating to the illicit traffic in narcotic drugs a ground of deportation. *Marcello*, in a supplemental petition for certiorari which was denied (348 U. S. 805) and *Gagliano* before the Court of Appeals and in his petition for a writ of certiorari, each argued that, since his conviction was not a ground for deportation at the time it was entered, he had a status of non-deportability which was preserved under the savings clause of the 1952 Act. While this Court did not expressly pass upon the savings

clause issue in the *Marcello* decision, it did uphold the constitutionality of the retroactive application of the new grounds for deportation spelled out in Section 241 (a) (11). 349 U. S. at 314. And in *Gagliano* the Fifth Circuit ruled that any reliance upon the savings clause to preserve a status of non-deportability was foreclosed by *Marcello.* Thus, *Marcello* implicitly, and *Gagliano* explicitly, held that the savings clause does not apply to grounds of deportation specified in Section 241 which are not by their own terms made applicable only prospectively.

Similarly, *Pino* v. *Nicholls,* 215 F. 2d 237, 246 (C. A. 1), involved an alien who before 1952 could not have been deported—in that case because one of the two crimes of which he had been convicted did not result in a prison sentence. After the 1952 Act made conviction for two crimes ground for deportation, regardless of whether a prison sentence had been imposed, the Court of Appeals for the First Circuit held the alien to be deportable, pointing out that subsection (d) of Section 241 laid to rest any doubt as to the retroactive effect of the section.[5] The subsequent decision of this Court, holding that the alien had never been actually convicted of

[5] In *Wong Kay Suey* v. *Brownell,* 227 F. 2d 41, 43 (C. A. D. C.), certiorari denied, 350 U. S. 969, the Court of Appeals for the District of Columbia Circuit also expressly recognized that Section 241 (d) constituted a specific exception to the savings clause, in contrast to the provision involved in that case (Sec. 360(a)).

the crime involved, (*Pino* v. *Landon*, 349 U. S. 901), did not affect the reasoning of the First Circuit on the issue of retroactivity.

While the particular grounds of deportation in the instant case are different, the holding of the court below is in substantial conflict with *Marcello, Pino,* and *Gagliano.* These cases held that grounds of deportability set forth in Section 241 have retroactive effect and apply to a condition existing before the 1952 Act which was not, before the enactment of that statute, a basis of deportation. In this case, on the other hand, the Court of Appeals has held that the prior condition of non-deportability was a "status" which was saved by the savings clause, even though the literal language of the governing subsections of Section 241, standing alone, admittedly applies here (App., *infra,* p. 26). There are no factual differences justifying this variance in result. That petitioner had previously become non-deportable as a stowaway because of the passing of the former statute of limitations, or non-deportable for his criminal convictions because of the conditional pardon, does not make his case different, with respect to the retroactive effect of Section 241, from those of *Marcello* and *Gagliano* whose prior convictions were not at the time they were entered deemed crimes involving moral turpitude, or *Pino* whose prior conviction was not originally a ground of deportation because no prison sentence was imposed. We believe, with

1954);[4] *Ex parte Robles-Rubio,* 119 F. Supp. 610 (N. D. Cal., 1954);[5] *Yanish* v. *Barber,* 128 F. Supp. 240 (N. D. Cal., 1955);[6] *Petition of Pringle,* 122 F. Supp. 90 (E. D. Va., 1953), aff'd per curiam *sub nom. United States* v. *Pringle,* 212 F. (2d) 878 (4 Cir., 1954). On occasion, this uniformly broad interpretation has led to a result adverse to the alien. See *United States* v. *Matles-Friedman,* 115 F. Supp. 261 (E. D. N. Y., 1953); *United States ex rel. Circella* v. *Neelly,* 115 F. Supp. 615, 625–626 (N. D. Ill., 1953).

It should be pointed out that the argument advanced by the appellee would make the savings clause all but meaningless. The effect of his argument is that where there has been a specific *change* in the law relating to deportation, the savings clause has no application. Yet it is only when there has been such a change that the savings clause is of any moment at all. As pointed

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[4] "It would appear from the language of this reservation that Congress, as a measure of policy or precaution, intended to preserve the effectiveness of all subsisting proceedings, orders, or judgments fixing or determining individual statuses, obligations, liabilities, or rights; and for this purpose to have continued in force the statutes or parts thereof under which such status, obligation, liability or right became fixed or determined." 211 F. (2d), at p. 470.

[5] "The saving clause in the 1952 Act is one of unusual breadth as is appropriate in a statute which effects a complete revision of the immigration and nationality laws of the nation. The breadth of the savings clause is indicative of the Congressional awareness that the 1952 Act would inevitably have unforeseen effects upon preexisting statuses and conditions, and the Congressional desire to avoid such effects in so far as possible." 119 F. Supp., at p. 613.

[6] "It is difficult to imagine a more inclusive savings clause than the one just quoted." 128 F. Supp., at p. 242.

the First and Fifth Circuits, that Congress has, in the 1952 Act, changed the law to make inapplicable the previous reason why in each instance deportation could not be effected. But since the court below has come to a different conclusion on this basic issue from that of the other circuits, there exists a conflict which should be resolved.

2. In addition to this conflict of circuits, some confusion exists among the courts as to the effect of the savings clause on deportation. As noted above, fn. 4, *supra*, p. 9, the district court which decided the instant case subsequently changed its mind and held that a stowaway not deported within the five year period specified under the 1917 Act had a status which was saved after enactment of the 1952 Act. *Sciria* v. *Lehmann*, 136 F. Supp. 458 (N. D. Ohio). On the other hand, in *Evans* v. *Murff*, 135 F. Supp. 907, 908–909 (D. Md.), now pending before the Fourth Circuit, the district court has held, *inter alia*, with relation to the same factual situation, that the savings clause does not protect the stowaway.

The court below admitted that its decision on the interplay of the savings clause and the deportation section "is not entirely free from doubt". Similar uncertainty as to the effect of the savings clause was expressed by the Court of Appeals for the Eighth Circuit in *United States ex rel. DeLuca* v. *O'Rourke*, 213 F. 2d 758, 764, when it held that a judicial recommendation of nondeportability as to a narcotics violation before

out in the *Shomberg* opinion, "Only when something in the new law introduces a change, thereby affecting one's status under the old law, is the savings clause called into play. Only then is a specific exception to § 405 required." 348 U. S. at 546.

On the other hand, the conclusion we have reached does no violence to the provisions of section 241 (d) of the Act; 8 U. S. C. A., Section 1251 (d), making the provisions as to deportability contained in section 241 applicable even though the alien entered the United States or that the other facts which make him deportable occurred prior to the passage of the Act. It must be remembered that section 403 of the 1952 Act expressly repealed the predecessor status, among them specifically the 1917 and 1924 Acts.[7] The purpose and effect of section 241 (d) is therefore to remove any doubt that the provisions of the Act as to deportation shall have retrospective as well as prospective application insofar as they are not superseded by the savings provisions of section 405. For example, we can assume without deciding that section 241 (a) (1); 8 U. S. C. A., Section 1251 (a) (1), would serve to make an alien deportable who entered the United States as a stowaway subsequent to July 1, 1924.[8]

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[7] 66 Stat. 279.

[8] The Immigration Act of 1924, 8 U. S. C. A., Section 201, et seq., effective July 1, 1924, did not contain a limitation period on deportability. Section 14 of the Immigration Act of 1924, 43 Stat. 162; 8 U. S. C. (1934 Ed.), Section 214. Therefore, an alien entering as a stowaway after that date could acquire no immunity to deportation by the passage of time. Although that section has now been repealed by the

1952 remained effective to bar deportation for that offense under the 1952 Act. Irrespective of the validity of that decision,[6] we think the doubts expressed by the two circuits as to the effect of the savings clause in this field, as well as the basic conflict discussed above, demonstrate the necessity for consideration of the issue by this Court.

3. Congress has explicitly expressed its intention that the grounds of deportation spelled out in the parts of Section 241 involved here shall have retrospective application. The savings clause, Section 405 (a), states that no "status" acquired under prior law is to be affected by the new Act "unless otherwise specifically provided therein." Section 241 (d) (*supra*, pp. 4, 10) does specifically provide otherwise. It begins with an

[6] In the *DeLuca* case and in *Ex parte Robles-Rubio*, 119 F. Supp. 610 (N. D. Cal.), the aliens were ordered deported under Section 241 (a) (11) of the 1952 Act, for narcotic violations committed prior to the 1952 Act and for which each had obtained a judicial recommendation against deportation that barred their deportation under prior law. A judicial recommendation against deportation continues to bar deportation under Section 241 (b) of the 1952 Act, *supra*, pp. 3–4. However, Section 241 (b) expressly applies only to those being deported under Section 241 (a) (4) for commission of crimes involving moral turpitude, whereas narcotic violators are now ordered deported under another Section, 241 (a) (11). The underlying issue to be resolved by the courts in *DeLuca* and *Robles-Rubio* was, therefore, whether Congress intended a judicial recommendation to continue to bar deportation of narcotic violators. This is quite a different substantive issue from that presented here. Each court found the question debatable and resorted to the savings clause to resolve the issue favorably to the aliens. 213 F. 2d at 764–765; 119 F. Supp. at 613–614.

The Immigration and Nationality Act is lengthy and complex. If the interplay of its here relevant sections is not entirely free from doubt, the result we have reached is we think consistent with "our duty 'to give effect, if possible to every clause and word of a statute.'" *United States* v. *Menasche,* 348 U. S., at 538–539. Moreover, if there be deemed to exist any reasonable doubt as to whether Congress intended to make an alien deportable, that doubt should be resolved in his favor. *Fong Haw Tan* v. *Phelan,* 333 U. S. 6, 10 (1948).

The order of the district court is set aside and the case is remanded for further proceedings consistent with the views expressed in this opinion.

JUDGMENT

(Filed December 17, 1955)

Appeal from the District Court of the United States for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court in this cause be and the same is hereby set aside and the case remanded to the District Court for further proceedings consistent with the views expressed in the opinion herein.

1952 Act, such a stowaway would presumably be deportable by reason of the cited sections of the 1952 Act.

explicit exception of its own: "Except as otherwise specifically provided in this *section*" (emphasis added); it does not say "except as otherwise specifically provided in this *Act*" so as to encompass Section 405 (a) within its exemption. Section 241 (d) then states in plain language that the provisions of Section 241 (a) shall apply to all aliens "notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act." The section's explicit exemption clause manifests a Congressional intent that no exceptions be found outside that section and the section's "notwithstanding" clause abolishes any "status" of nondeportability respondent might have enjoyed under prior law. Under these linked provisions, the general language of the savings clause must succumb to the specific provisions of Section 241 (d), contrary to the holding of the court below that the savings clause "supersedes" the provisions of Section 241 (d).[1]

The decision below thus misapplies this Court's decisions in *Shomberg* v. *United States*, 348 U. S.

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[1] The court below said (App., *infra*, p. 31):

"* * * The purpose and effect of section 241 (d) is therefore to remove any doubt that the provisions of the Act as to deportation shall have retrospective as well as prospective application insofar as *they are not superseded by the savings provisions of section 405.* * * *" [Emphasis added.]

ORDER DENYING REHEARING

(Filed January 30, 1956)

The Petition for rehearing is denied.

STIPULATION FOR SUBSTITUTION OF PARTY—APPELLEE

(Filed February 16, 1956)

It is hereby stipulated and agreed by and between the respective parties hereto that the name of John M. Lehmann be substituted for that of J. S. Kershner as Officer in Charge.

(S) HENRY C. LAVINE,
Attorney for Plaintiff-Appellant.
SUMNER CANARY,
U. S. Attorney.
(S) EBEN H. COCKLEY,
Assistant U. S. Attorney.

APPROVED: (S) POTTER STEWART,
Circuit Judge.

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540, and *United States* v. *Menasche*, 348 U. S. 528, both of which dealt with the relationship of the savings clause to sections of Title III of the Immigration and Nationality Act of 1952 dealing with nationality and naturalization. In *Menasche*, the Court reviewed the history of this type of savings clause and concluded that its whole development shows a well established congressional policy not to strip aliens of advantages gained under prior laws. 348 U. S. at pp. 531–535. Since the Court found no specific exception to the savings clause in the rest of the 1952 Act, it held that *Menasche* gained an inchoate right by filing a declaration of intention under the prior law which was preserved to him by the savings clause. 348 U. S. at 539. In *Shomberg*, however, the Court found a specific exemption to the savings clause in Section 318 which commenced with the words "Notwithstanding the provisions of Section 405 (b)" and held therefore that Shomberg's right, gained under prior law, was not preserved. The following language of the Court is pertinent here:

> * * * In using the "notwithstanding" language in these sections, Congress clearly manifested its intent that certain policies should override the otherwise broad and pervasive principle of the savings clause. In *United States v. Menasche, supra,* we recognized the wide scope to be given the savings clause. We would be lax in our duty if we did not give recognition also

> to the congressional purpose to override the savings clause when other considerations were thought more compelling than the preservation of the *status quo*. * * * 348 U. S. at 547–548.

The court below, using the words "notwithstanding the provisions of section 405 (b)" as the standard of what constitutes a clear exception, concluded that the language of Section 241 (d) did not meet the test. Congress is not, however, required to use "magical passwords" to effectuate an exemption from the provisions of a clause in a statute or another statute. Cf. *Marcello* v. *Bonds*, 349 U. S. at 310. The language of Section 241 (d) is, we think, as clear as the language of Section 318 in expressing the Congressional purpose that those grounds of deportation in Section 241 which were not expressly made effective prospectively should have general retroactive scope.[8] See *Wong Kay Suey* v. *Brownell*, 227 F. 2d 41, 43 (C. A. D. C.), certiorari denied, 350 U. S. 969, *supra*, p. 12, fn. 5. The rationale of *Shomberg*, rather than *Menasche*, should properly have been applied in this case.

4. An interpretation of Section 241 (d) to reach those in respondent's position accords with the purpose of Congress as reflected in the changes it made in the Immigration Act of 1917

[8] As pointed out by the First Circuit in *Pino*, 215 F. 2d at 246, when Congress wished a ground for deportation in Section 241 to have only prospective effect, it used the word "hereafter." *E. g.*, 241 (a) (3).

under which respondent obtained his alleged status of non-deportability. In recommending the abolition of the then existing five-year statute of limitation in Section 19 of the 1917 Act, *supra*, p. 5, on deportation of aliens excludable at the time of entry, the report of the Committee on the Judiciary observed: "* * * If the cause for exclusion existed at the time of entry, it is believed that such aliens are just as undesirable at any subsequent time as they are within the 5 years after entry." (S. Rep. 1515, 81st Cong., 2nd Sess., p. 389).[9] Congress also changed Section 19 of the 1917 Act, *supra*, p. 5—which made the deportation provision for commission of crimes involving moral turpitude inapplicable "to one who has been pardoned"—to read "in the case of any alien who has * * * been granted a full and unconditional pardon", in Section 241 (b) of the 1952 Act. This change was obviously made in disapproval of the ruling, under the 1917 law, by the Board of Immigration Appeals that the conditional type of pardon granted to respondent was a "pardon" within the purview of the 1917 Act. This display of Congressional lack of

[9] The 1953 report of the President's Commission on Immigration and Nationality, *Whom We Shall Welcome*, at page 198, interpreted this change as we do:

"Indeed, the 1952 statute retroactively rescinded the limited statute of limitations fixed by previous law. An alien who entered the United States 25 years ago, and whose entry involved a purely technical violation, enjoyed immunity from deportation for the last 20 years. Under the 1952 Act, he is now again subject to deportation * * *.

sympathy for those in respondent's position, coupled with the express language of Section 241 (d) making the grounds of deportation retroactive, indicates that Congress intended an alien such as respondent to be deported.

Congress has the power to deport for acts done in the past. *Marcello* v. *Bonds,* 349 U. S. 302, 314. It has the power to take away or reinstate a remedy such as the statute of limitations.[10] Cf. *Campbell* v. *Holt,* 115 U. S. 620, 628; *Chase Securities Corp.* v. *Donaldson,* 325 U. S. 304, 314. Both of these powers it exercised in Section 241 of the 1952 Act.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted.

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Attorneys.

APRIL 1956.

[10] In this connection we note that, when Congress wishes to save such remedies, it does so expressly. See *Bridges* v. *United States,* 346 U. S. 209, 226–227. The savings clause of the 1952 Act does not mention the preserving of remedies.

APPENDIX

No. 12361

United States Court of Appeals for the Sixth Circuit

UNITED STATES OF AMERICA, EX REL. BRUNO CARSON OR BRUNO CARASANITI, APPELLANT

v.

J. S. KERSHNER, OFFICER IN CHARGE, APPELLEE

Appeal from the United States District Court for the Northern District of Ohio, Eastern Division.

Decided December 17, 1955.

Before MARTIN, MILLER and STEWART, Circuit Judges.

STEWART, Circuit Judge. A warrant of arrest in deportation proceedings was issued against the relator, Bruno Carson, in June of 1953. After a hearing before a Special Inquiry Officer of the Immigration and Naturalization Service he was ordered to be deported in the manner provided by law on the charges contained in the warrant of arrest. Following an unsuccessful appeal to the Board of Immigration Appeals he sought a writ of habeas corpus in the district court. He is here on an appeal from the district court's order denying the writ.

Carson is about fifty-four years old. He was born in Italy and entered the United States as

a stowaway in 1919. Under the Immigration Act of February 5, 1917, then in effect, deportation proceedings could have been brought against him at any time within five years after his entry as a stowaway. No such proceedings were brought, and relator thereafter became immune from deportation on the stowaway charge under then existing law.[1]

In 1936 Carson was convicted in Ohio courts of two separate offenses of blackmail and was sentenced to a prison term of one to five years upon each conviction. After his release from prison in 1941 deportation proceedings were commenced against him under a warrant of arrest issued in 1937, based upon these two criminal convictions. In 1945 the outstanding order of deportation was withdrawn and the proceedings were terminated when the Governor of Ohio granted a conditional pardon for the second of his two convictions. This pardon was granted to Carson "From this time forward, conditioned upon good behavior and conduct and provided that he demeans himself as a law-abiding person and is not convicted of any other crime, otherwise this pardon to become null and void." It is conceded that the pardon granted to Carson was sufficient to confer

[1] Section 19 of the Immigration Act of February 5, 1917, 39 Stat. 874, 889; 8 U. S. C. (1934 Ed.), Section 155, provided: "At any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law * * * "shall be deported. Stowaways were among the classes excluded at the time of appellant's entry under Section 3 of the 1917 Act, 39 Stat. 876; 8 U. S. C. (1934 Ed.) Section 136 (l).

immunity to deportation under the law then in effect.[2]

So far as the record shows, Carson has been a law-abiding person since his release from the penitentiary in 1941. He is married to a native born citizen and is the father of four native born children, two of them dependent minors. He is a carpenter and builder, earning about $6,000 a year.

The current deportation proceedings were initiated under the provisions of the Immigration and Nationality Act, effective December 24, 1952, 66 Stat. 163. They are based upon Carson's entry as a stowaway thirty-six years ago, and upon his two criminal convictions almost twenty years ago. Though conceding that Carson had acquired a status of nondeportability prior to the passage of the 1952 Act, appellee contends that Carson has now become deportable by virtue of the provisions of that statute.

The claim that Carson is deportable by reason of having entered as a stowaway is based upon Section 241 (a) (1) of the 1952 Act, 66 Stat. 204; 8 U. S. C. A., Section 1251 (a) (1). That section provides: "Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who— (1) at the time of entry was within one or more

[2] Section 19 (a) of the Immigration Act of 1917, as amended, 54 Stat. 671; 8 U. S. C. (1946 Ed.), Section 155 (a), then in effect, provided: "The provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned. * * *"

of the classes of aliens excludable by the law existing at the time of such entry." As to Carson's deportability by reason of the two 1936 convictions despite his conditional pardon for one of them, appellee relies upon Section 241 (a) (4) and Section 241 (b) of the 1952 Act, 8 U. S. C. A., Section 1251 (a) (4) and 8 U. S. C. A., Section 1251 (b). The first of these sections provides in part: "Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—(4) * * * at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct. * * *" The second of the two sections provides in part: "The provisions of subsection (a) (4) of this section respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and *unconditional* pardon by * * * the Governor of any of the several States. * * *" [Emphasis added.]

As to each of the grounds upon which the proposed deportation is based, appellee also calls our attention to Section 241 (d) of the 1952 Act; 8 U. S. C. A., Section 1251 (d). That section provides: "Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a) of this section, notwithstanding (1) that any such alien entered the United States prior to June 27, 1952, or (2) that the facts, by reason of which any such alien belongs to any of the classes enu-

merated in subsection (a) of this section, occurred prior to June 27, 1952."

In the district court it was contended that since Carson was not deportable under the law as it existed prior to the effective date of the 1952 Act, that statute, insofar as it sought to make his previous conduct grounds for deportation, was an ex post facto law and therefore violative of Article I, Section 9, of the Constitution. In a brief memorandum incorporating the findings and reasoning of the Board of Immigration Appeals, the district court rejected this contention and denied the writ.

In this respect the court's conclusion was entirely correct, and supported by unambiguous authority. "And whatever might have been said at an earlier date for applying the *ex post facto* Clause, it has been the unbroken rule of this Court that it has no application to deportation." *Galvan* v. *Press*, 347 U. S. 522, at 531 (1954). "That aliens remain vulnerable to expulsion after long residence is a practice that bristles with severity. But it is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state. Such is the traditional power of the Nation over the alien and we leave the law on the subject as we find it." *Harisiades* v. *Shaugnessy*, 342 U. S. 580, at 587–588 (1952). "The interest which an alien has in continued residence in this country is protected only so far as Congress may choose to protect it; Congress may direct that all shall go back, or that some shall go back and some may stay; and it may distinguish between the two by such tests as it thinks appropriate." *United States ex rel. Ka-*

Ioudis v. *Shaugnessy*, 180 F. (2d) 489, 490 (2 Cir., 1950). So if the question here were one only of the power of Congress to deport Carson, the answer would seem clear that that power exists.

The unanswered question in this case, however, is not what Congress had the power to do, but what it did do. As to that, the above-cited statutory provisions, standing alone, would appear to give a clear answer, and require affirmance of the district court's order denying the writ of habeas corpus. But these provisions do not stand alone.

Section 405 of the 1952 Act, 8 U. S. C. A., Section 1101, note p. 156, contains a broad general savings clause. This clause provides in material part as follows:

> "(a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of * * * any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such * * * statutes [sic], conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. * * *"

This section therefore preserves Carson's status of nondeportability, "unless otherwise specifically provided" in the Act. It is appellee's contention that the Act does "otherwise specifically provide," in the above-cited sections upon which he relies. Relator insists that the quoted sections do

not "otherwise specifically provide." Upon the resolution of that issue depends the disposition of this appeal.

The scope of the savings clause has recently been examined by the Supreme Court in two cases decided the same day, *United States* v. *Menasche,* 348 U. S. 528 (1955) and *Shomberg* v. *United States,* 348 U. S. 540 (1955). Though both cases involved the naturalization rather than the deportation provisions of the 1952 Act, the analysis the opinions make of the savings clause is significantly helpful in determining the questions at issue in the present case.

In the *Menasche* case it was held that the savings clause operated to protect the alien's previously acquired status. The Court traced the origin and development in our immigration and naturalization statutes of this savings provision. 348 U. S. 528, at 531–535. It was the Court's conclusion that "The whole development of this general savings clause, its predecessors accompanying each of the recent codifications in the field of immigration and naturalization, manifests a well-established congressional policy not to strip aliens of advantages gained under prior laws. The consistent broadening of the savings provision, particularly in its general terminology, indicates that this policy of preservation was intended to apply to matters both within and without the specific contemplation of Congress." 348 U. S. at 535.

In the *Shomberg* case the Court held that the savings provisions of section 405 of the Act did not preserve the alien's previously acquired status from the operation of section 318 of the

Act. The Court found that the relevant savings clause in that case was the one contained in section 405 (b). That section, like section 405 (a), consists of a general savings provision which applies unless "otherwise specifically provided." Since section 318 expressly states that its provisions shall be applicable "notwithstanding the provisions of section 405 (b) of this Act," the Court concluded that here was an instance where the Act had "otherwise specifically provided" and where the savings clause therefore was superseded. In passing, the Court pointed out four other places in the 1952 Act where Congress had "clearly manifested its intent that certain policies should override the otherwise broad and pervasive principle of the savings clause." 348 U. S. at 547; see footnote 5. In each instance cited the statute expressly states that a given provision shall apply "notwithstanding" the provisions of the savings clause.[3]

The *Menasche* and the *Shomberg* opinions thus clearly teach that the savings clause is to be interpreted as protecting status acquired under prior legislation, unless the intent to withdraw that protection is manifestly clear. It was held in the *Shomberg* case that such intent is clear where it is specifically provided that a provision shall be effective "notwithstanding" the terms of the savings clause. No such clear manifestation of intent is apparent in the present case.

We conclude that Carson's status of nondeportability is protected by section 405 of the Act, since the statutory provisions upon which appellee re-

[3] See also *United States* v. *Stromberg*, * * * F. (2d) * * * (5 Cir., November 15, 1955).

lies do not constitute such specific exceptions to section 405 as are contemplated in that section in order to make it inapplicable. In reaching this conclusion we have been aided by the reasoning of a recent decision directly in point by Judge McNamee of the Northern District of Ohio, in *United States ex rel. Dominic Sciria* v. *John H. Lehmann,* decided October 7, 1955. In a characteristically clear and thorough opinion, Judge McNamee concluded that section 405 (a) of the Act operated to protect the status of an alien entering as a stowaway in 1922 who had acquired immunity to deportation by the passage of time under the 1917 Act. It was Judge McNamee who denied the writ of habeas corpus in the present case. In the *Sciria* opinion he expressly stated his conclusion that he had been in error in the present case, pointing out that the savings clause had not been relied upon by Carson in the hearing before him. While Judge McNamee refrained from commenting upon the other ground for deportation relied upon in the present case, i. e., the fact that the pardon Carson received was not an unconditional one, the reasoning of his opinion in the *Sciria* case would also clearly lead to the conclusion we have reached that Carson's status of nondeportability on this ground is likewise preserved by section 405 (a) of the Act.

Other federal courts have uniformly given a broad interpretation to section 405 in varying factual situations. See *United States ex rel. De Luca* v. *O'Rourke,* 213 F. (2d) 759 (8 Cir. 1954); *Yanish* v. *Barber,* 211 F. (2d) 467 (9 Cir.,